Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

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REAL PROPERTY,
in Section 9, Town 29 North,
Range 1 West Township of Charlton,
Otsego County, MI, et al.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

◆

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth Circuit Court of Appeals can avoid providing meaningful relief for loss of use and enjoyment of property and replacement housing required from a *James Daniel Good* due process violation by knowingly making false statements about issues not being raised in the lower court?

II. Whether the Sixth Circuit Court of Appeals can avoid providing meaningful relief required from a *James Daniel Good* due process violation by ignoring issues raised on appeal that the government wrongdoer caused lost profits by stopping production of two gas wells and created uncertainty in the amount of damages by failing to create an escrow account?

LIST OF PARTIES

Petitioner-Claimant, Daniel Scott Gahagan, and Respondent, United States of America, are the remaining parties to the proceedings in the Sixth Circuit Court of Appeals.

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THE PETITIONER, Daniel Scott Gahagan, attorney at law in good standing in the state of Colorado, former student body president of the University of Denver College of Law and last surviving claimant in this twenty-two year forfeiture case respectfully prays that a writ of certiorari issue to review the opinion of the United States court of Appeals for the Sixth Circuit, entered in the above-captioned action on July 29, 2009.

OPINION BELOW

The unpublished opinion of the Court of Appeals for the Sixth Circuit and the Petition for Rehearing is reprinted in the Appendix hereto, p. 1a, infra. Included in the Appendix are two District Court Orders required by the Clerk of the Supreme Court, Jeff Atkins, from a telephone conversation on September 25, 2007.

JURISDICTION

The United States of America commenced this action pursuant to the forfeiture provisions of Title 21 U.S.C. §881 seeking civil forfeiture of the defendant properties involved in the narcotics provisions of 21 U.S.C. §881 and 18 U.S.C. §983 et seq. The basis for jurisdiction is 28 U.S.C. §1345, 28 U.S.C. §1333 and 28 U.S.C. §1355. On March 20, 2009 the Sixth Circuit Court of Appeals issued an unpublished opinion affirming no decision by the District Court thereby denying any meaningful relief for a due process violation under *James Daniel Good*. The Petition for Rehearing En Banc was denied on July 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V.

No person shall be deprived of life, liberty, or property, without due process of law.

This decision involves the following questions of exceptional importance that conflict with the decisions of the United States Supreme Court in United States v. James Daniel Good, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), Union Pacific Railroad v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S. Ct 101, 58 L. Ed 179 (1913), Fletcher v. Peck, 10 U.S. 87, 138-139 (6 Cranch) (1810), Austin v. United States, 509 U.S. 602, 125 L.Ed. 2d 488, 113 S.Ct 2801, 2814-15 (1993), and United States v. Hosep Krikor Bajakajian, 524 U.S. 321, 141 L.Ed.2d 314, 118 S.Ct. 2028 (1998). The decision also conflicts with the authoritative decision of the Sixth Circuit Court of Appeals in Pembaur v. City of Cincinnati, 882 F.2d 1101, 1104, 1106 (6th Cir. 1989), Broan Mfg. V. Assoc. Distributors, Inc. 923 F.2d 1232, 1235, 1236 (6th Cir. 1991), Grantham and Mann, Inc. v. Am. Safety prods., Inc., 831 F.2d 596, 601 (6th Cir. 1987), United States v. Real Property in Section 9 Town 29 North Range 1 West township of Charlton, Otsego County, Michigan, 241 F.3d 796 (6th Cir. 2001), and Von Hofe v. United States, 492 F.3d 175, pg.25 (2nd Cir. 2007) and the unanimous decision

of all circuits that mandate meaningful relief for Fifth Amendment Constitutional Due Process violations.

The opinion statutorily conflicts with 19 U.S.C. § 1621, 18 U.S.C. § 985, 21 U.S.C. § 881(a)(6), and 21 U.S.C. § 881(a)(7). Consideration by the court is therefore necessary to secure and maintain uniformity of the court's decisions.

STATEMENT OF THE CASE

The issues presented in this petition concern an illegal seizure of a home and property by the government for twenty-two years, and the refusal by the lower court and court of appeals to consider any meaningful relief. The Sixth Circuit Court of Appeals in an unpublished opinion dated March 20, 2009 did knowingly make false statements about issues not being raised in lower court and intentionally ignored issues to avoid granting any meaningful relief required by the Supreme Court in United States v. James Daniel Good, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) and the Civil Asset Forfeiture Reform act of 2000 (CAFRA) 18 U.S.C. §985. The panel of appellate judges who presided over this illegal seizure case refused to address issues raised on

appeal that the government caused a loss of use and enjoyment of property, replacement housing, and lost profits. The decision by the Sixth Circuit cannot withstand legal scrutiny and totally disregards their obligation to afford due process, follow precedent and uphold forfeiture law.

The long history of this case began on November 12, 1987 when the government seized all Gahagan family owned property, past and present. The first judge assigned to the case was the wise and seasoned Judge Churchill who made a formidable effort to understand the issues and the facts. He dismissed the original Complaint for a lack particularity and through summary judgment separated the parcels, returned property to bona fide purchasers, held Agnes Gahagan, the mother, to be an innocent owner and denied probable cause to government claims raised before the forfeiture laws were enacted. Judge Churchill acknowledged that Title 21 U.S.C. §881(a)(6) did not become effective until November 10, 1978.

> "Title 21 U.S.C. §881(a)(6) may not be applied retroactively to drug trafficking activity occurring before November 10, 1978, the effective date of the statute. Interests acquired by claimants before that

> date are not subject to forfeiture under this provision." (R.403, Memorandum, pg.6; Apx.pg.114).
>
> "The claimants acquired substantial interests in Parcels C, D and E before November 10, 1978, the effective date of the statute. As best the Court can ascertain from the records, Daniel Gahagan acquired a possessory interest in Parcel C as early as February, 1976. Daniel and Michael Gahagan acquired their possessory interest in Parcel D in 1975 and in Parcel E, 1976. Even if drug money could be traced to the acquisitions of these parcels, and there is no evidence to even suggest this possibility, the statute would not have retroactive application to these acquisitions." (R.403, Memorandum, pg.20; Apx.pg.128).[1]

In the same Memorandum Opinions Judge Churchill acknowledged that Title 21 U.S.C. § 881(a)(7) did not become effective until October 12, 1984. (R.403, Memorandum, pg.6; Apx.pg.114). Upon his retirement the case was assigned to Judge Cleland. Judge Cleland returned all the property denying forfeiture only to have his decision overturned by the Supreme Court in United States v. Ursery, 518 U.S. 267, 135 L.Ed.2d

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1 Apx. stands for joint appendix which was on file in the Sixth Circuit Court of Appeals.

549, 116 S.Ct. 2135 (1996). After the reversal the case went to the Sixth Circuit Court of Appeals who remanded it ordering the lower court to apply CAFRA with a new burden of proof. Newly assigned Judge Lawson promptly granted summary judgment to the government only to reverse himself upon reconsidering he imposed the incorrect standards of proof. Judge Ludington was then assigned to the case and disallowed any statutory limitations overruling Judge Churchill's probable cause determinations on retroactivity and disregarding 19 U.S.C. § 1621. Judge Ludington, however, determined the seizure illegal under *James Daniel Good* and held that the government had denied the Gahagans "beneficial use" of the property and restricted all access "such that he is entitled to remedies under *Good*." (R.853, Order; pg.10, 14, Apx.pg.433). Ignoring requests in a motion for summary judgment and in a motion for reconsideration, and in pleadings listing a monetary itemization of damages that *Good* mandated meaningful relief for loss of use and enjoyment of property, replacement housing and lost profits, Judge Ludington without explanation rendered the Supreme Court decision meaningless and sidestepped the issue of damages.

The case was appealed to the Sixth Circuit which in an unpublished opinion turned blind eyes and deaf ears to the district court's silence on meaningful relief. The issues of loss of use and enjoyment of property and replacement housing were pretended to have never been raised in lower court. The issue of lost profits was brushed aside as too speculative without considering it was the government who made lost profits speculative. There was no explanation how the government was able to take a family home and property without an illegal connection, before forfeiture laws were enacted, and after expiration of the statute of limitations. In fact the opinion was written in a manner to avoid any reference to controlling Supreme Court precedent and avert further legal scrutiny.

The Sixth Circuit had a duty initially and on rehearing to address all issues and an obligation to explain their reasoning and conclusions with support from authoritative law, and not rubber stamp an incomplete lower court decision. Some legal opinions are well reasoned and some are questionable. At least, however, there is an explanation of the thought process in achieving the means to the end. In this instance there is nothing other than silence.

This is assumed to be the country where home and property are protected by constitutional safeguards with a justice system that does not turn a blind eye and deaf ear to the rights of citizens. If this assumption is correct then why is the Sixth Circuit refusing to look at all the issues and not listening to arguments that are statutorily sound and supported by Supreme Court precedent? The court of appeals is supposed to be a court of review, however, this court refused to conduct any semblance of review and made a twenty-two year old case with a serious constitutional violation to simply vanish without any accountability or reasonable explanation.

REASONS FOR GRANTING THE WRIT

Judge Ludington in a Order Granting in Part and Denying in Part Claimant's Motion for Summary Judgment held on July 9, 2007 that "[t]he parties agree that Gahagan never received a preseizure hearing as contemplated by *James Daniel Good* or CAFRA." (R.853, Order; pg.9, Apx.pg.432). United States v. James Daniel Good, 510 U.S. 43, 54, 114, S.Ct. 492, 501, 126 L.Ed.2d 490 (1993). Judge Ludington further acknowledged citing to the Sixth Circuit in United States v. Real Property Located at 1184 Drycreek Road, Granville Ohio, 174 F.3d 720, 728, 733 (6th Cir. 1999) that the

government must pay the claimant for any damages such as lost profits and rents.

> "Rather, the government is responsible for rents and profits of which the claimant was deprived during the period of illegal seizure. (R.853, Order; pg. 9, Apx.pg.432).

Also, as stated by the Supreme Court in *James Daniel Good* and codified in CAFRA 18 U.S.C. §985(b)(1)(B).

> "the owners or occupants of the real property shall not be evicted from, or other wise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action." 18 U.S.C. §985(b)(1)(B).

The Sixth Circuit further held "[t]here is no dispute that *Good* applied to this case," and "the government must pay the claimant any damages, such as lost profits or rents that accrued during the period of the illegal seizure."

I. THE SIXTH CIRCUIT COURT OF APPEALS CANNOT AVOID PROVIDING MEANINGFUL RELIEF FOR LOSS OF USE AND ENJOYMENT OF PROPERTY AND REPLACEMENT HOUSING REQUIRED FROM A *JAMES DANIEL GOOD* DUE PROCESS VIOLATION BY KNOWINGLY MAKING FALSE STATEMENTS ABOUT THE ISSUES NOT BEING RAISED IN THE LOWER COURT.

The three judge panel consisting of Judges Keith, Cole and Mckeague in an unpublished opinion dated March 20, 2009 did knowingly make a false statement of material fact or law before a tribunal. The panel stated that "[d]amages for the loss of use and enjoyment of property and for replacement housing are not available to Daniel because he did not request these damages in the district court." The panel erred in making this statement and in a petition for rehearing timely filed April 24, 2009 it was brought to their attention that Judge Ludington ordered briefing and "itemization of alleged damages" in his Opinion March 8, 2007 (R. 822, Opinion, pg.34. Apx.169).

In accord with the Order the issue of damages from twenty-two years of illegal seizure was briefed as was a demand for specific monetary damages concerning loss of use and enjoyment of property and replacement housing on each separate parcel. (R.827, Brief on Property Tax Relief and Damages, pg.5,6,7, Apx.pg.1527).

The issue of awarding damages was again raised in the Motion for Summary Judgment on Lost Profits April 23, 2007, (R.836, pg.15,16,17,18,19,20 f.n.#6, Apx.pg.216). Contrary to the Sixth Circuit's statement that "Daniel's summary judgment motion requested only lost profits," page 19 of that summary judgment motion stated:

> "Because of the illegal seizure the government must pay claimants damages for lost profits and for loss of use and enjoyment of the land to which claimants were entitled." (R.836, Motion, pg.19, Apx.pg.216).

On July 9, 2007 in the Opinion to the Motion for Summary Judgment on Lost Profits Judge Ludington addressed the issue of loss of use and enjoyment of property in an Order stating;

> "It therefore is apparent to the Court that Gahagan was denied beneficial use of the property." (R. 853, Order, pg.14, Apx.pg.424).

The issue of awarding damages was again raised in the Motion to Reconsider Summary Judgment on Lost Profits July 20, 2007 (R.856, pg.7,8).

> "Claimants also suffered the loss of use and enjoyment of their home and property for

> over twenty years and are entitled to damages in tort under CAFRA 28 U.S.C. § 2680(h) as well as $238,000.00 in rent for replacement housing." (R.856, Motion, pg.7).

Lastly, on August 3, 2007 in the Comments and Objections to Forfeiture (R.858, pg.2) the identical quote from the Motion to Reconsider Summary Judgment on Lost Profits was raised again. The panel was also made aware that the issues had been previously raised in over twelve pleadings before three different judges and were uncontested by the government.[2]

After the panel was presented with

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[2] The issues of loss of use and enjoyment of property and replacement housing were also previously raised in a Motion for Reconsideration March 19, 2007 (R. 824, pg.4, f.n#2), and in the Motion for Property Tax Relief and Damages November 20, 2006 (R. 802, pg. 3,4,12,13, 14, Apx.pg.1464), and Reply December 19, 2006 (R.812, pg. 2, 5). It was also raised in the Petition Pursuant to the Excessive Fines Clause of the Eighth Amendment August 28, 2006 and November 2, 2006 (R.766, R.803, pg. 8, Apx. pg.1375, 1479); the Motion in Limine August 7, 2006 (R. 762 pg. 5, Apx.pg.1364) and claimant's Trial Brief October 24, 2006, pg. 27.

Before Judge Lawson it was raised October 2, 2001 in the Reply to Motion from Release from Arrest, (R. 695, pg. 2, 9) and November 13, 2001 Motion to Suppress (R. 697, pg. 3,6,7), and in the February 6, 2002 Reply (R. 732, pg. 2). The issue was raised initially before Judge Cleland in a Motion for Removal of Lis Pendens and for Damages from Lost Profits November 16, 1999 (R. 674, pg. 15), and Reply December 23, 1999 (R. 679, pg. 3).

undisputable evidence they had made a false statement they had the opportunity to take corrective action on rehearing, however, they let the statement stand thereby acknowledging that they actually knew the statement was false and were knowingly and intentionally perpetrating fraud. A Complaint of Judicial Misconduct was filed with the Office of the Circuit Executive on August 10, 2009 claiming there was undisputable evidence that the three judges did knowingly make a false statement of material fact or law before a tribunal. (Case No. 06-09-90090/91/92).

Judges are not above the code of professional responsibility and are bound by a standard of professional ethics. Knowingly making a false statement of material fact or law before a tribunal is serious fraudulent judicial misconduct. This is not about "making a very wrong legal decision." This is about making a statement that is untruthful outside the boundaries of legal discretion and involves personal moral impropriety. The Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power or the Supreme Court to reconsider issues properly raised on appeal. Sp.Ct. Rule 10(a).

II. THE SIXTH CIRCUIT COURT OF APPEALS CANNOT AVOID PROVIDING MEANINGFUL RELIEF REQUIRED FROM A *JAMES DANIEL GOOD* DUE PROCESS VIOLATION BY IGNORING ISSUES RAISED ON APPEAL THAT THE GOVERNMENT WRONGDOER CAUSED LOST PROFITS BY STOPPING PRODUCTION OF TWO GAS WELLS AND CREATED UNCERTAINTY IN THE AMOUNT OF DAMAGES BY FAILING TO CREATE AN ESCROW ACCOUNT.

The Sixth Circuit held there is no dispute that *Good* applied to this case, however, there was a failure to prove the worth of the natural resources and the amount of depletion, and any calculation of profits that were "lost is purely speculative." The issue raised on appeal, however, was whether the government can preclude profits from being realized and then claim there were no actual profits and no obligation to pay. The issue that the amount of damages were speculative and presumed was undisputed because an actual "demonstration" or "calculation of profits" was prevented by the government. The real question was, can the government be allowed to be in the position of collecting funds and purposely neglecting those duties and argue there were no funds or the funds are too difficult to calculate?

The logic of this situation is very simple. Gas production was assured by drilling two wells---*but for* the government illegally stopping production---

profits were lost. If the government would have followed Judge Churchill's Order to prevent dissipation and prevent waste, and allowed Energy Quest to produce the gas and escrow the profits as they suggested, the lost profits in the escrow account could be determined with certainty.[3] The government's refusal to form an escrow account caused the uncertainty and a fair and reasonable assessment of the *amount* of lost profits is the only recourse. The erroneous reasoning of the court is the failure to consider that a violator cannot escape all liability simply because the injured party cannot prove the precise amount of damages for which the violator is responsible. Standard Machinery Co. v. Duncan Shaw Corp. 208 F.2d 61, 65 (1st Cir. 1953).

If we are to follow the Sixth Circuit's reasoning there could never be a Good claim for

[3] The government was approached by Mr. Jeffrey Schwartz, vice president of Energy Quest Inc. and the law office of Kuhn, Carnes & Anderson P.C. to allow drilling of two gas wells with profits escrowed. The government without reason refused and prevented any profits from being realized. Mr. Jeffrey Schwartz of Energy Quest went as far as contacting Senator Carl Levin in the United States Senate requesting help to persuade the government to be more cooperative. (R.836, See Exhibit J, Letter from Energy Quest, and Exhibit K, Letter from Kuhn, Carnes & Anderson P.C.; Apx.267-70).

lost profits, thus rendering the Supreme Court decision meaningless. The government could illegally seize a business, shut it down and claim no lost profits. There was no production so any profits that were lost would be speculative and not meet the court's criteria for an award of damages.[4] The court mistakenly required an unrealistic and impossible burden of proof of the precise *amount* of damages not understanding that there is a lower burden of proof because of the uncertainty caused by the wrongdoer.

> "The law does not require impossibilities; and can not therefore require a higher degree of certainty than the nature of the case admits." Broan Mfg. v. Assoc. Distributors, Inc. 923 F.2d 1232, 1240 (6th Cir. 1991).

Because of the government's wrongdoings presumed damages are permitted in this case and expert auditor, John Hultan, compiled production reports of surrounding wells and formulated a fair and reasonable assessment based on reliable data and of reasonable certainty. (R.836, Hultin Audit; Exhibit O, Apx.pg.277-308).

[4]The analogy would be if the government seized an apartment building and evicted the tenants, thereby collecting no rent, and then claimed no obligation for lost rents because there were no rent payments.

What the Sixth Circuit did not understand about speculative damages is the sharp distinction between proof of the *fact* of damage and proof of the *amount* of damage. Broan Mfg. v. Assoc. Distributors, Inc. 923 F.2d 1232, 1235 (6th Cir. 1991).

> "The rule serves to preclude recovery, however, only where the *fact* of damage is uncertain. i.e., where the damage claimed is not the certain result of the wrong, not where the *amount* of damage alone is uncertain. Grantham and Mann, Inc. v. Am. Safety prods., Inc., 831 F.2d 596, 601 (6th Cir. 1987).

The government never disputed that gas existed under the property and agreed with their expert geologist, Michael Barret, that the only way for a "demonstration" or "calculation of profits" was to drill two wells. It is also undisputed that the government refused access to any drilling on the land and refused to escrow any profits, and that the government caused the *fact* of lost profits. (i.e. damages). The *fact* of damage has nothing to do with "demonstrating the differences between resources that were available to be sold for profit and those that remain."[5]

[5]Any gas that remains under the property would now "lie with the land" and would be lost with the forfeiture.

Calculating the *amount* of lost profits with reasonable, not absolute certainty is a real issue on appeal. The Sixth Circuit has confused the most elementary conceptions of justice and public policy which require the wrongdoer to bear the risk of the uncertainty his own wrong has created. Broan Mfg. v. Assoc. Distributors, Inc. 923 F.2d 1232, 1236 (6th Cir. 1991), citing, Bigelow v. RKO Radio Pictures Inc., 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946).

CONCLUSION

As the Eighth Circuit quoted "[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law." United States v. One 1976 Ford F-150 Pick-Up VIN YUB03797, 769 F.2d 525, 527 (8th Cir. 1985), quoting, United States v. One Ford Coach, 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939). Further, as the court noted in United States v. All Those Certain Lots in Virginia Beach, 657 F.Supp. 1062, 1065 (E.D.Va. 1987), citing South Dakota v. Opperman, 428 U.S. 364, 367-68, 96 S.Ct. 3092, 3096-97, 49 L.Ed.2d 1000 (1976), "courts have traditionally drawn a distinction between one's personal property and one's home, according the latter far greater protection under the law."

CAFRA was passed to offer greater protection to one's home and to prevent this kind of abuse by the government. In this instance the government seized property with no hearing, no probable cause, and restricted all access requiring replacement housing and causing lost profits. The home was vandalized with broken doors and windows, suffered extensive water damage and severe deterioration. No property taxes were paid and the unpaid taxes now exceed the value of the property. The government refused all pleas of common sense and did little to maintain the property for twenty-two years.

Not only is the Sixth Circuit not following the intent of Congress, they are circumventing precedent set forth by the Supreme Court and their own circuit. Pembaur v. City of Cincinnati, 882 F.2d 1101, 1105, 1106 (6th Cir. 1989) requires damages to be adequately considered. Broan Mfg. v. Assoc. Distributors, Inc. 923 F.2d 1232, 1236 (6th Cir. 1991) requires the wrongdoer to bear the risk of the uncertainty his own wrong has created. United States v. Real Property in Section 9, 241 F.3d 796 (6th Cir. 2001) requires the court to "...not take away any vested rights possessed by either party, increase liability or attach new legal consequences to past conduct." The Supreme

Court held in Austin v. United States, 509 U.S. 602, 125 L.Ed. 2d 488, 113 S.Ct 2801, 2814-15 (1993). (Scalia, J., concurring) that seizing an entire building with no connection to illegal activity would be an excessive fine under the Eight Amendment. The Supreme Court also held that a seizure such as this would not meet the tests set out in United States v. Hosep Krikor Bajakajian, 524 U.S. 321, 141 L.Ed.2d 314, 118 S.Ct. 2028 (1998). See also, Von Hofe v. United States, 492 F.3d 175, 186-187 (2nd Cir. 2007).

There is a considerable split among the circuits on specific remedies for a *James Daniel Good* due process violation, whether it be a payment of damages, replacement housing, lost profits or when there are no damages, suppression of evidence and even outright dismissal. United States v. Real Property Located at 1184 Drycreek Road, 174 F.3d 720, 728, 733 (6th Cir. 1999). There is unanimous agreement, however, with all the circuits except the Sixth Circuit that one must be "made whole."

Circumventing due process has been the common practice throughout this case with a total disregard of the real issues. It appears it matters not there was a loss of use and enjoyment of property and the family was forced to live

elsewhere. It matters not that the government caused lost profits while the property had been illegally seized for twenty-two years. It matters not that the forfeiture occurred after expiration of the statute of limitations and before forfeiture laws were enacted. It matters not there is no connection of substance to the defendant parcels of land. It seems that it is acceptable for the government to use whatever improper means necessary to accomplish the ends of forfeiting the home and property.

Every avenue has been pursued in the judicial process to have this case heard. All rules and procedures have been followed and all issues have been timely raised. Unfortunately, If judges want to avoid decisions by making things up about not being previously raised, or by simply keeping silent and ignoring it altogether, there is no recourse other than praying for the supervisory power of the Supreme Court. Michael John Gahagan was a co-claimant in this case and shouldered the responsibility that his conduct was the cause of losing the family home. That burden and the hopelessness of achieving a just and truthful outcome produced a downward spiral too much to bear and he passed away on July 20, 2008. Living with that sadness makes it very difficult

not to be weary of this expensive and protracted litigation, however, even a bad decision or even a dumb decision would not carry such a heavy burden of frustration as a dishonest decision. Having judges who are not true to the United States Constitution and who do not uphold the law undermines the very basis of the judicial process and is a sad commentary on American justice.

DATED this 9th day of October, 2009.

Daniel S. Gahagan
Petitioner-Claimant
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APPENDIX

No. 07-2254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

FILED
March 20, 2009
Leonard Green, Clerk

Plaintiff-Appellee,

DANIEL S. GAHAGAN; MICHAEL J. GAHAGAN; AGNES RIDDLE-GAHAGAN,

Defendant-Appellants,

REAL PROPERTY IN SECTION 9, Town 29 North, Range 1 West, Township of Charlton, Otsego County, MI, et al.,

Defendants

ORDER

Before: KEITH, COLE, and MCKEAGUE, Circuit Judges.

Defendant-Appellants Daniel S. Gahagan, Michael J. Gahagan, and Agnes Riddle-Gahagan appeal the judgment of the district court ordering forfeiture of real property located in Otsego County, Michigan. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

This appeal concerns several parcels of land, identified as Parcels C-1, D-1, D-3, E-1, located in Otsego County, Michigan. In November 1987, the government filed an in rem civil forfeiture action against Appellants after an investigation revealed that the parcels were acquired with proceeds of and had been used to facilitate drug trafficking. During the course of litigation, the trial court determined that there was no probable cause to forfeit parcel E-1. In 1997, summary judgment of forfeiture was entered against Appellants as to the remaining parcels. On appeal, we determined that the Civil Asset Forfeiture Reform Act ("CAFRA"), 18 U.S.C. § 983, which was enacted while the appeal was pending, was remedial and applied to the Appellants' claims. Accordingly, we remanded with instructions to the district court to apply the new forfeiture statute. *See United States ve Real*

Property in Section 9, Town 29, North, Range 1 West, Tp. Of Charlton, Otsego County, Mich, 241 F.3d 796 (6th Cir. 2001).

The matter ultimately proceeded to trial in October 2006. The jury found that Parcels C-1 and D-1 were subject to forfeiture under theories of both facilitation and proceeds, and although Parcel D-3 was acquired with proceeds form illegal drugs, Appellant Daniel Gahagan was an innocent owner of that parcel. Following trial, the district court directed the parties to file motions for summary judgment regarding the determination of damages. In their motion, Appellants claimed entitlement to tax relief or Parcel D-3, and damages for lost profits from the natural resources for both Parcel D-3 and E-1 as the result of the government's improper seizure of these parcels.

The district court subsequently determined that Appellants were entitled to tax relief on Parcel D-3. The district court denied the claim for lost profits because Appellants could not demonstrate the extent of the resources available or that any drainage of resources occurred. Final judgment was entered on August 10, 2007, ordering forfeiture of Parcels C-1 and D-1, and that Parcel D-3 be held by the government and Daniel Gahagan as joint tenants with rights of survivorship.

Appellants subsequently filed a notice of appeal, raising four claims for relief. The government contends, however, that Appellant Daniel Gahagan is the only appropriate party to this appeal. We agree. Appellant Agnes Riddle-Gahagan is deceased, and we denied a motion for substitution of a party due to death on February 14, 2008. Further, the district court entered judgment against the claims of Appellant Michael Gahagan on March 8, 2007, and Michael waived his claims. The government has since filed a motion to dismiss Michael as a party, notifying the court that Michael died on July 20, 2008. The government's motion to dismiss Michael Gahagan is granted, as only Daniel Gahagan's claims are at issue here. Daniel has filed a motion for costs and the government has filed a motion to dismiss the appeal for Daniel's failure to file a proper joint appendix.

Daniel first argues that the district court erred in finding that he was not entitled to certain damages as a result of the government's improper seizure of his property under *United States v. James Daniel Good Real Property*, 510, U.S. 43 (1993). In *Good*, the Supreme Court held that the government must hold a hearing before seizing a house subject to forfeiture. Daniel claims that the

remedies for failure to provide a hearing include damages for lost profits, loss of use and enjoyment of property, and replacement housing, as well as the suppression of evidence obtained via the government's seizure. We review a grant of summary judgment in a forfeiture action de novo. *United States v. Certain Real Property Located at 16510 Ashton, Detroit, Wayne County, Mich.*, 47 F.3d 1465, 1468-69 (6th Cir. 1995). Findings of fact are reviewed for clear error, *Howard v. City of Beavercreek*, 276, FI3d 802, 805 (6th Cir. 2002, and are viewed in the light most favorable to the non-moving party. *16510 Ashton*, 47, F.3d at 1469.

There is no dispute that *Good* applies to this case. Likewise, it is undisputed that no pre deprivation hearing was held prior to the government's seizure of the subject property. The parties only dispute the remedies available for such a violation.

We have previously determined that failure to hold a hearing under *Good* does not invalidate forfeiture; instead, the government must pay the claimant any damages, such as lost profits or rents, that accrued during the period of the illegal seizure. *United States sv. Real Property Located at 1184 Drycreek Rd.* 174 F.2d 720, 727-28 (6th Cir. 1999). After review, we conclude that the district

court properly determined the damages available to Daniel.

Damages for lost profits are not available because the district court determined that Daniel failed to prove either the worth of the natural resources on Parcels D-3 and E-1 or the amount of depletion; on appeal, Daniel has failed to show that the district court's factual findings were clearly erroneous, which is his burden. *Howard*, 276, F.3d at 805. Even if we were to accept Daniel's assertion that the government prevented profits from being realized, without a demonstration of the difference between the resources that were available to be sold for profit and those that remain, any calculation of profits that were "lost' is purely speculative. As a general rule, damages are not permitted which are remote and speculative in nature. *Grantham and Mann, Inc. V. Am. Safety Prods. Inc.*, 831, F.2d 596, 601 (6th Cir 1987).

Damages for loss of use and enjoyment of property and for replacement housing are not available to Daniel because he did not request these damages in the district court. Daniel's summary judgment motion requested only lost profits. Because he did not raise a claim for these damages in the district court, we may not consider

the issue on appeal. *See J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1489 (6th Cir. 1991).

Second, Daniel contends the district court erred by failing to suppress all evidence obtained by the government as a consequence of the unlawful seizure of his property. Citing *1184 Drycreek R.*, 174, F.3d at 728 n.4, he contends the period of the unlawful seizure should be deemed to have commenced at the time of the criminal offense precipitating the seizure of property, in 1984, and that all evidence uncovered since that time should have been excluded.

While some of sister circuits have recognized the validity of the suppression remedy in the post-*Good* era, the majority have not. In *1184 Drycreek Rd.*, as the district court observed, we held that the government's payment of the claimant's damages is the appropriate remedy, it would have no effect on the outcome in this case. Contrary to Daniel's otherwise unsupported argument, the decision he relies on actually states that "[t]he period of illegal seizure may be measured from the *date of the illegal seizure itself*." *1184 Drycreek Rd.* 174, F.3d at 728 n.4 (emphasis added). If *this* rule were applied, Daniel conceded below, "very minimal" evidence would have been subject to

suppression. That is, he conceded that most of the government's evidence of his drug-trafficking activities could be traced to law enforcement officials' pre-seizure investigation.

Indeed, overwhelming evidence stemming from the pre-seizure investigation established that the subject property was used to facilitate drug-trafficking. To date, Daniel has still failed to specifically identify what, if any, inculpatory evidence was derived form the actual seizure of the property. It follows that the district court's refusal to suppress evidence, if error at all, was harmless error.

Daniel's remaining claims relate to the district court's interpretation of our remand regarding the scope of evidence which could be presented at trial. In these claims Daniel asserts that the district court erroneously disregarded a prior decision made in this case by Judge James P. Churchill on August 28, 1992. In the decision, Judge Churchill granted partial summary judgment to Appellants on claims that the government lacked probable cause to support various theories of forfeiture on the subject properties. Daniel asserts that this ruling became the "law of the case," and that Judge "Thomas L. Ludington, who presided over the case after

remand, improperly allowed the jury to consider evidence that had previously been foreclosed by Judge Churchill. Daniel claims that the use of such evidence violated the proportionality test of the Excessive Fines Clause of the Eight Amendment, and, without the inadmissible evidence, the government's proof of facilitation was insufficient to establish a violation under CAFRA.

We conclude that Daniel's arguments regarding the scope of evidence at trial lack merit. Pursuant to 28 U.S.C. § 2106, an appellate court may issue a general or limited remand. A limited remand must "explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. General remands, in contrast, give district courts authority to address all matters as long as remaining consistent with the remand." *United States* v. *Campbell*, 168 F.3d 263, 265, (6th Cir. 1999). Here, we remanded the district court's grant of summary judgment "for further proceedings applying the new forfeiture statute to this case." *Otsego County*, 241, F.3d at 800. Because this remand did not explicitly outline the issues to be addressed by the district court, it must be considered a general remand. Accordingly, the district court had the authority to address all

matters, including the scope of evidence allowed at trial. Moreover, because CAFRA altered the government's burden of proof, it was imperative that the district court reconsider all of the government's potential evidence to determine whether its admission comported with the new standard. This necessarily involved a reconsideration of the issues which had been determined prior to remand. Thus, the district court was not precluded from reconsidering evidence previously ruled on by Judge Churchill.

Finally, regarding the respective motions filed by the parties, because we find that Daniel's claims lack merit, the government's motion to dismiss the appeal for failure to file a proper joint appendix is denied as moot. Daniel's motion for costs is denied. As previously noted, the government's motion to dismiss Michael Gahagan is granted. The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 87-CV-10338-BC
Honorable Thomas L. Ludington

REAL PROPERTY IN SECTION 9,
TOWN 29 NORTH, RANGE 1 WEST
TOWNSHIP OF CHARLTON, OTSEGO
MICHIGAN, et al.,

Defendants.

DANIEL S. GAHAGAN
MICHAEL J. GAHAGAN
AGNES RIDDLE-GAHAGAN

Claimants

_____/

ORDER DENYING CLAIMANT'S MOTION FOR STAY OF JUDGMENT OF FORFEITURE

This matter is before the Court on Claimant Daniel Gahagan's motion for stay of judgment of forfeiture. The Court reviewed the parties' submissions and held a telephonic hearing on September 24, 2007. At the conclusion of the hearing, the Court denied Claimant's motion.

Accordingly, it is ORDERED that the claimant Daniel Gahagan's motion of stay of judgment of forfeiture [dkt # 862] is DENIED for the reasons stated on the record.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: September 25, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 87-CV-10338-BC
Honorable Thomas L. Ludington

REAL PROPERTY IN SECTION 9,
TOWN 29 NORTH, RANGE 1 WEST
TOWNSHIP OF CHARLTON, OTSEGO
MICHIGAN, et al.,

Defendants,

DANIEL S. GAHGAN

Claimant.
_____/

ORDER OVERRULING CLAIMANT'S OBJECTIONS

This matter is before the Court on the government's proposed final judgment of forfeiture and claimant Daniel Gahagan's commentary and objections to that document. Gahagan complains that the government's proposal is "filled with erroneous and inaccurate declaration that are contrary to the holding of Judge Churchill, Magistrate Binder, Judge Cleland, Judge Lawson, and this Court." Gahagan objs at 1. He reiterates his belief that he is entitled to

damages as a matter of law because he never received a pre-seizure hearing as contemplated by *United States v. James Daniel Good* and as codified in CAFRA. He also maintains that he possesses an ownership interest in the mineral rights on the property. The Court has reviewed Gahagan's submissions and concludes that he advances arguments addressed and resolved at various states in the litigation. In the Court's view, all issues in the case have been resolved and further motion practice is unnecessary. A final judgment of forfeiture as modified by the Court shall enter.

Finally, the government proposes in its draft judgment that it file a motion for cost seeking, among other things, reimbursement for an expert that it retained, appropriately, to address Gahagan's due process challenges. The Court believes that such a motion is unnecessary. There is no justification in the lengthy record for an award of costs against either side.

Accordingly, it is ORDERED that Gahagan's objections [dkt # 858] are OVERRULED.
A final judgment shall enter.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: August 10, 2007

No. 07-2254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

FILED
July 29, 2009
Leonard Green, Clerk

DANIEL S. GAHAGAN; MICHAEL J. GAHAGAN; AGNES RIDDLE-GAHAGAN,

Defendant-Appellants,

REAL PROPERTY IN SECTION 9, Town 29 North, Range 1 West, Township of Charlton, Otsego County, MI, et al.,

Defendants

ORDER

Before: SUHRHEINRICH, SUTTON and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original

panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk